No. 1031

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

WILBUR G. SILVERMAN, as administrator of the estate of HARRY L. SILVERMAN,

Petitioner,

—against—

THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1963

WILBUR G. SILVERMAN, as administrator of the estate of HARRY L. SILVERMAN,

Petitioner,

—against—

THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

The petitioner prays that a Writ of Certiorari be issued to review the order of the Appellate Term of the Supreme Court of the State of New York, First Department, dated and entered November 7th, 1963, which affirmed without opinion a judgment of the Civil Court of the City of New York, New York County, dated and entered August 7, 1963, and said judgment.

Leave to appeal to the Appellate Division of the Supreme Court, First Department, was denied by an order of the Appellate Term of the Supreme Court of the State of New York, dated and entered November 26 1963. Leave to appeal to the Appellate Division of the Supreme Court, First Department, was denied by an order of said Court, dated and entered January 28, 1964.

Opinions Below

The Civil Court of the City of New York, County of New York, rendered an opinion in an order entered in the office of the Clerk of the Civil Court of the City of New York, County of New York, on April 12, 1963, which was not reported.

The Appellate Term of the Supreme Court of the State of New York, First Department, in affirming the judgment rendered no opinion. No opinions were rendered by the Appellate Term of the Supreme Court of the State of New York, First Department, nor by the Appellate Division of the Supreme Court of the State of New York, First Department, respectively, in denying motions for leave to appeal to the Appellate Division of the Supreme Court of the State of New York.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257. Petitioner's remedies in the State Court were exhausted upon the denial, successively, by the Appellate Term of the Supreme Court, First Department and the Appellate Division of the Supreme Court, First Department, of petitioner's motions for leave to appeal from the Order of affirmance of the judgment made by the Appellate Term of the Supreme Court, First Department.

Thus, the Order of affirmance of the said Appellate Term, constitutes the decision of the highest State Court in which a decision could be had, since no higher State Court had jurisdiction to review the determination of the said Appel-

late Term. *Mich.-Wisc. Pipe Line Co.* v. *Calvert, Texas*, 1954, 74 S. Ct. 396, 347 U.S. 157; *U.S. ex rel. Carrono* v. *Richmond, D.C. Conn.* 1959, 177 F. Supp. 504, affid. 279 F. 2d 170; *Virginia Railway Co.* v. *Mullens*, 1926, 271 U.S. 220, 46 S. Ct. 526.

Questions Presented

1. Was pay for vacation time for services already rendered a vested right, the denial of which resulted in a deprivation of due process of law under the Fourteenth Amendment of the United States Constitution?

2. Was the denial of vacation pay for services already rendered under an implied and expressed contract, an impairment of the obligations of said contract, under Article I, Section 10 of the United States Constitution?

Constitutional and Statutory Provisions Involved

1. *U.S. Constitution, Amendment XIV, Section 1.*

> "* * * nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. *U.S. Constitution, Article I, Section 10:*

> "No state shall * * * pass any * * * Law impairing the obligation of contracts, * * *".

3. *Resolution approved by the Board of Estimate on "Leave Regulations for Employees who are Under the Career and Salary Plan".*

Resolved, By the Board of Estimate, that the following leave regulations be and the same are hereby established effective, July 1, 1956.

1. Applicability of Regulations

1.0 * * *

2. Annual Leave Allowance

2.0 * * *

2.1 Annual leave allowance shall be granted to permanent employees who work a five day week, as follows:

Category	Annual Leave Allowance	Monthly Accrual
Employees on staff prior to the effective date of these regulations	27 work days (five weeks & two days)	2¼ days

Statement

Petitioner's decedent was continuously employed by the respondent from April 6, 1908, until his death on May 24, 1959.

As such employee, there was applicable to him, the Career and Salary Plan for Employees of the City of New York and the Leave Regulations thereto. He was entitled to earned annual leave credits under the terms of his employment with the respondent from the time of his original appointment until his death. At the time of his death, petitioner's decedent had accrued, under the Career and Salary Plan and Leave Regulations thereto, fifty-four days of annual leave allowance. During his employment, he per-

formed his duties with devotion and assiduity. At the time of his death, his salary was $5,990.00 per annum.

In the Court of first instance, the Constitutional questions sought to be reviewed were raised on petitioner's motion for summary judgment in a Memorandum of Law in support of said motion, which motion resulted, however, in an order for summary judgment in favor of the respondent, dismissing the complaint. In the Appellate Term of the Supreme Court of the State of New York, on appeal from the judgment, the Constitutional questions were again raised in the appellant's brief and were again raised both in the said Appellate Term and in the Appellate Division of the Supreme Court of the State of New York, in the briefs filed in support of the application for leave to appeal to the said Appellate Division from the order of affirmance of said Appellate Term.

The opinion of the Court of original jurisdiction refused to adopt petitioner's contention that the right to payment for accrued leave was a vested one.

The Court held:

> "Recovery is predicated on an expressed contract said to be found in the Career and Salary Plan and the Leave Regulations promulgated thereunder and in an implied contract under regulations in effect prior to the adoption of the plan. The right to annual leave is claimed to be a vested one and not a gratuity. Under the law it is contemplated that the leave must be taken during the period of employment. The employee had the right to leave and regular wages for that period even though he did not work. The manner of employment is not of controlling significance. The deceased could not have demanded in salary in

lieu of the annual leave and there is no showing of any provision for payment of moneys in lieu of annual leave existing up to the time of decedent's death and the administrator could acquire no greater rights than the decedent possessed."

There were no opinions rendered in the Appellate Courts and the only determinations were to affrm the judgment of the Court of original jurisdiction and, in each instance, to deny leave to appeal to a higher Court, without opinion.

Reasons for Granting the Writ

The judgment of the State Court, as affirmed by the Appellate Term, affects not only the petitioner's decedent herein, but also most of the Civil Service employees, numbering in excess of 213,000[1], who are employed by the City of New York under the provisions of the Career and Salary Plan and the Leave Regulations thereto. In effect, the respondent has, in the past, deprived its employees and should this decision be permitted to stand, will deprive present and future employees of compensation which has already been earned, for the sole reason that such employees have or will have died after having earned vacation pay. The Court of original jurisdiction in denying petitioner's application for summary judgment and in granting summary judgment in favor of the respondent, overruled the contentions of the petitioner concerning respondent's violations of the Federal Constitution. The Appellate Courts in affirming the judgment of the original Court, and in denying leave to appeal to a higher Appellate Court, effectively froze the

[1] The City of New York Official Directory, 1963, p. 13.

determination of the Court of original jurisdiction in its determination of the Federal Constitutional questions. These determinations are in complete conflict with other State and Federal decisions.

In *Wylie* v. *City Commission of the City of Grand Rapids, Mich.*, 293 Mich. 571, 587, 292 N.W. 668, 674, it was held:

> "A 'vested right' as that term is used in relation to constitutional guaranties, implies an interest 'which it is proper for the State to recognize and protect, and of which the individual could not be deprived without injustice.' City of Los Angeles v. Oliver, 102 Cal. App. 299, 283, P. 298, 303. * * *
>
> "Now, what is a vested right? Without reference to a dictionary definition, we would define it as a right, so fixed, that it is not dependent on any future act, contingency or decision to make it more secure. Kennedy Coal Corp. v. Buckhorn Coal Corp., 140 Va. 37, 124 S.E. 482, 484."

In *Ramey* v. *State*, 296, Mich. 449, 296 N.W. 323, 325, the Court quoting from the *Wylie* case, further held:

> "Under the facts in this case, plaintiffs had performed all acts necessary to insure themselves the right of the vacation with pay. * * *. There was nothing remaining for them to do but to exercise the right which depended on no contingency but which was complete and mature. In my opinion, vacation with pay is not a gratuity; it is compensation for services rendered."

The Supreme Court of the United States held in *Fisk* v. *Jefferson Police Parish*, 116 U.S. 131 at 134:

> "After the services have been rendered under a law, resolution or ordinance which fixes the rate of com-

pensation, there arises an implied contract to pay for those services at that rate. The contract is a completed contract. Its obligation is perfect, and rests on the remedies that the law gives for its enforcement."

Also, in *Thomas* v. *Hoss*, 143 Oregon 41, 21 P. 2 234 at 236, it was held:

> "It is well settled that after a salary has been earned, that public employees' right thereto becomes vested and cannot be taken away by legislation thereafter enacted."

In re *Wil-low Cafeterias*, 111 F. 2d 429 at 432, (2 Cir. 1940), the Court held:

> "A vacation with pay is in effect additional wages. * * *
>
> "In Donlan v. Boston, 223 Mass. 285, 111 N.E. 718, 719, a school teacher died during the summer vacation having completed her teaching for the preceding academic year. Her salary was payable monthly and payment of salary for the last month had not become due at the time of her death. The Supreme Court of Massachusettes treated the contract as subject to 'an implied condition * * * that she should be living and physically able to do the work' and disallowed her salary for the final month. With much respect, we cannot agree with the decision. It has been criticized by Professor Williston in a footnote to Sec. 838 of the Revised Edition of Williston on Contracts published in 1936. He says: 'There was no express condition, qualifying the city's promise and as the teacher had substantially fulfilled her contract, there was no failure of consideration.' In the case at bar, similarly the claimant had worked for a year and was entitled to his vacation pay."

Also, in the case of *U. S.* v. *Munroe VanHelas Co.*, 243 F. 2d 10 (5th Cir. 1957) at pg. 13, the Court held:

> "Vacation pay is by all of the decisions regarded as wages."
>
> "'Wages' are compensation for personal services rendered by an employee, and are 'earned' when the service is rendered even though not then payable."

Also, in *General Tire & Rubber Co.* v. *Local 512*, 191 F. Supp. 911 at 914 (aff'd 294 F. 2d 957):

> "Vacation pay is in the nature of deferred compensation, in lieu of wages earned each week the employee works and payable at some later date. Goodall-Sanford, Inc. v. U. S. Textile Workers, 1st Cir. 1956, 233 F. 2d 104; In re Wil-low Cafeterias, 2d Cir. 1940, 111 F. 2d 429; Textile Workers Union Co. of America, A.F.L., C.I.O. v. Herbert B. Newton & Co., 1959, 394 Pa. 422, 147 A. 2d 155; Botany Mills, Inc. v. Textile Workers Union, 1958, 50 N.J. Super 18, 141 A. 2d 107."

Livingston v. *Wyley Sons, Inc.*, 313 F. 2d 52 at 58, Footnote 4.

In the case at bar, as in the cited cases, decedent rendered services for which he was entitled to leave time under the New York City Board of Estimate resolution which fixed the rate of compensation. There arose, therefore, an implied contract to pay at said rate. Since such leave time had been earned, the right to pay therefor became vested and was part of the compensation to which decedent was entitled.

The refusal of the respondent herein, a subdivision of the State to make payment for vacation pay, which under

the decisions, constitutes compensation; or additional wages, already earned, results in a denial of due process, proscribed by the Fourteenth Amendment of the Federal Constitution.

The decision of the Court below is directly in conflict with decisions of the highest Court of other States as well as the Courts of Appeal of the Circuits in which the decisions cited above were rendered.

Moreover, as a subdivision of the State, respondent is likewise proscribed, under Article I, Subdivision 10 of the Federal Constitution, from impairing its contract with decedent. The respondent, in refusing to honor its contract, has thus impaired said contract under the aforementioned leave regulations promulgated by the resolution of the Board of Estimate of the City of New York, as well as its implied contract with the decedent which arose as a result of its having granted leave time to him during the entire fifty-one years of his employment, all in violation of the aforementioned Article I, Subdivision 10 of the Federal Constitution.

In *Robertson* v. *Miller*, 276 U.S. 174 at 179, the Supreme Court held:

> "But after services have been rendered by a public officer under a law specifying his compensation, there arises an implied contract under which he is entitled to have the amount so fixed and the constitutional protection extends to such contracts, just as it does to those specifically expressed."

In the case at bar, the decedent, a public employee, under a resolution specifying his compensation, with respect to

leave pay and allowances was entitled to have the amount thereof so fixed and the Constitutional protection extended thereto.

CONCLUSION

Petition for a writ of certiorari should be granted.

Respectfully submitted,

WILBUR G. SILVERMAN
Attorney for Petitioner

APPENDIX

Affidavit on Motion in Appellate Term for Leave to Appeal to Appellate Division

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM—FIRST DEPARTMENT

WILBUR G. SILVERMAN, as administrator of the estate of HARRY L. SILVERMAN,

Plaintiff-Appellant

—against—

THE CITY OF NEW YORK,

Defendant-Respondent

STATE OF NEW YORK }
COUNTY OF QUEENS } ss.:

WILBUR G. SILVERMAN, being duly sworn, deposes and says that he is the administrator of the estate of Harry L. Silverman and makes this affidavit in support of an application for leave to appeal to the Appellate Division from the affirmance of the judgment dismissing the complaint herein, and from the order granting to the defendant summary judgment.

The facts in the case were conceded that plaintiff's decedent was continuously employed by the defendant from April 6, 1908 until his death on May 24, 1959. That as such employee, there was applicable to him the Career and Sal-

Affidavit on Motion in Appellate Term for Leave to Appeal to Appellate Division

ary Plan for Employees of the City of New York and the Leave Regulations thereto. That at the time of his death, he had accrued fifty-four days of annual leave allowance pursuant to said Career and Salary Plan and Leave Regulations thereto.

There are only questions of law to be decided herein. These questions to be decided by the Appellate Division, if this motion be granted, are as follows:

1. Is vacation pay a vested right to which an employee is entitled pursuant to a contract, express or implied?

2. Is the denial of pay for vacation accrued by reason of work already performed, a denial of due process of law under the Federal and State Constitutions?

3. Is the denial of pay for vacation accrued by reason of work already performed, an impairment of the obligation of contract prohibited by the United States Constitution, Article I, Section 10?

Research fails to disclose that these questions have been decided by any Appellate Court in this State higher than the Appellate term. Appellate Courts in other States and the United States Supreme Court having rendered decisions which in the opinion of deponent, are contrary to that determined by this Court such conflicts warrant that permission be granted to appeal to a higher Appellate Court so that the Constitutional questions hereinabove raised be determined.

Affidavit on Motion in Appellate Term for Leave to Appeal to Appellate Division

WHEREFORE, deponent prays that an order to be made and entered herein granting the plaintiff-appellant herein leave to appeal to the Appellate Division, First Department.

/s/ WILBUR G. SILVERMAN

Sworn to before me this
13 day of November 1963.

MELVIN METZGER
Notary Public, State of New York
No. 41-2677510 Queens County
Commission Expires March 30, 1965

Affidavit on Motion in Appellate Division for Leave to Appeal to Appellate Division

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

WILBUR G. SILVERMAN, as administrator of the estate of HARRY L. SILVERMAN,

Plaintiff-Appellant,

—against—

THE CITY OF NEW YORK,

Defendant-Respondent.

STATE OF NEW YORK }
COUNTY OF QUEENS } ss.:

WILBUR G. SILVERMAN, being duly sworn, deposes and says that he is the administrator of the estate of Harry L. Silverman, deceased, and makes this affidavit in support of the application for leave to appeal to the Appellate Division from the affirmance by the Appellate Term of the judgment of the Civil Court, New York County, dismissing the complaint herein, and from the order granting the defendant summary judgment upon which order the said judgment was based. An application to the Appellate Term, First Department, for leave to appeal was denied by an order of the said Appellate Term, dated November 26, 1963, a copy of which is hereto annexed.

Affidavit on Motion in Appellate Division for Leave to Appeal to Appellate Division

The facts in the case were conceded as follows: That plaintiff's decedent was continuously employed by the defendant from April 6, 1908 until his death on May 24, 1959. That as such employee, there was applicable to him the Career and Salary Plan for Employees of the City of New York and the Leave Regulations thereto.

That plaintiff's decedent was entitled to earned annual leave credits under the terms of his employment with the defendant from the time of his appointment aforementioned until his death. That at the time of his death, plaintiff's decedent had accrued fifty-four days of annual leave allowance pursuant to the Career and Salary Plan and Leave Regulations thereto.

The defendant refused to pay compensation for the accrued leave time. Summary judgment was sought on behalf of the plaintiff which motion was denied and instead, summary judgment was granted to the defendant in the Civil Court and said order and judgment were affirmed without opinion by the Appellate Term. The grounds of the alleged error of the Courts below are as follows: Prior to the passage of the Career and Salary Plan, plaintiff's decedent was granted annual leave. Subsequent to the passage of the Career and Salary Plan, the annual leave time was spelled out under the terms of the plan. Under either circumstance contract between plaintiff's decedent, as employee, and the defendant, as employer was created, at least impliedly prior to the promulgation of the Career and Salary Plan, and expressly after the passage of the Board of Estimate of such plan. Compensation to which such em-

ployee was entitled, constituted not only the monetary amount fixed by his title, but also the leave time which had accrued. Consequently, refusal to pay for such accrued time resulted in an arbitrary denial of due process of both the Federal and State Constitution.

Vacation time accrues by reason of work already performed. It follows, therefore, that once the work has been performed, the right to such pay is vested. Refusal to pay for such time, since there was nothing further required to be done by the employee, results in denial of due process as above stated. Moreover, the denial of such pay for vacation accrued, where the work required to be performed has already been completed, constitutes an impairment of the obligation of the implied contract created by reason of the granting of vacation time over the long period of decedent's employment and of the express contract contained in the Career and Salary Plan promulgated by the Board of Estimate of the City of New York. Such impairment is in violation of the United States Constitution, Article I, Section 10.

The Courts below in their respective decisions, have placed reliance upon decisions of Courts no higher than the Appellate Term. It is respectively submitted that leave should be granted not only upon the Constitutional questions raised but also by reason of the fact that no Appellate Court of this State higher than that of the Appellate Term has ever rendered a determination on these questions heretofore.

Affidavit on Motion in Appellate Division for Leave to Appeal to Appellate Division

WHEREFORE, deponent prays that an order be made and entered herein granting the instant motion for leave to appeal to the Appellate Division, First Department.

/s/ WILBUR G. SILVERMAN

Sworn to before me this
13 day of December 1963.

MELVIN METZGER
Notary Public, State of New York
No. 41-2677510 Queens County
Commission Expires March 30, 1965